

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3 THE BANK OF NEW YORK MELLON,

4 Plaintiff

5 v.

6 NEVADA ASSOCIATION SERVICES,  
7 INC.; PARKSIDE VILLAGE  
8 HOMEOWNERS' ASSOCIATION; and  
9 WILLISTON INVESTMENT GROUP LLC,

Defendants

Case No.: 2:16-cv-00370-APG-BNW

**Order (1) Granting in Part Parkside's  
Motions; (2) Denying Bank of New York  
Mellon's Motion; and (3) Granting in Part  
Williston's Motion**

[ECF Nos. 44, 48, 51, 52]

10 This is a dispute over whether a deed of trust still encumbers property located at 8124  
11 Jasmine Hollow Court, Las Vegas, Nevada. Plaintiff Bank of New York Mellon (BONY) seeks  
12 a judicial determination that its deed of trust still encumbers the property following a non-  
13 judicial foreclosure sale conducted by defendant Parkside Village Homeowners' Association  
14 after the prior property owners failed to pay homeowners association (HOA) assessments.  
15 Defendant Williston Investment Group LLC purchased the property at the HOA foreclosure sale.

16 BONY seeks a declaration that the deed of trust was not extinguished because the HOA  
17 and its foreclosure agent, defendant Nevada Association Services, Inc. (NAS), failed to provide  
18 proper notice of the sale; the HOA foreclosure statute as it existed at the time of the HOA sale  
19 was unconstitutional; BONY's predecessor offered to pay the superpriority lien prior to the sale;  
20 and the sale should be set aside on equitable grounds. BONY also asserts damages claims  
21 against Parkside and NAS for breach of Nevada Revised Statutes § 116.1113, wrongful  
22 foreclosure, and deceptive trade practices. Williston counterclaims for a declaration that the  
23 HOA sale extinguished the deed of trust.

1 Parkside moves to dismiss and for summary judgment. Williston and BONY also move  
2 for summary judgment. The parties are familiar with the facts, and I will not repeat them here  
3 except where necessary to resolve the motions. I grant in part Williston and Parkside's motions.  
4 I deny BONY's motion.

## 5 **I. LEGAL STANDARDS**

6 In considering a motion to dismiss, "all well-pleaded allegations of material fact are taken  
7 as true and construed in a light most favorable to the non-moving party." *Wyler Summit P'ship v.*  
8 *Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). However, I do not assume the truth  
9 of legal conclusions merely because they are cast in the form of factual allegations. *See Clegg v.*  
10 *Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). A plaintiff must make sufficient  
11 factual allegations to establish a plausible entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550  
12 U.S. 544, 556 (2007). Such allegations must amount to "more than labels and conclusions, [or] a  
13 formulaic recitation of the elements of a cause of action." *Id.* at 555.

14 Summary judgment is appropriate if the movant shows "there is no genuine dispute as to  
15 any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.  
16 56(a), (c). A fact is material if it "might affect the outcome of the suit under the governing law."  
17 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if "the evidence  
18 is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

19 The party seeking summary judgment bears the initial burden of informing the court of  
20 the basis for its motion and identifying those portions of the record that demonstrate the absence  
21 of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The  
22 burden then shifts to the non-moving party to set forth specific facts demonstrating there is a  
23 genuine issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531

1 (9th Cir. 2000); *Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989, 992 (9th Cir. 2018) (“To defeat  
2 summary judgment, the nonmoving party must produce evidence of a genuine dispute of material  
3 fact that could satisfy its burden at trial.”). I view the evidence and reasonable inferences in the  
4 light most favorable to the non-moving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523  
5 F.3d 915, 920 (9th Cir. 2008).

## 6 **II. ANALYSIS**

### 7 **A. Determining Adverse Interests in Property**

8 Count one of BONY’s complaint and Williston’s counterclaim seek to determine whether  
9 BONY’s deed of trust was extinguished by the HOA foreclosure sale. The parties raise  
10 numerous issues regarding this claim, including the applicable statute of limitations, tender,  
11 whether the sale was for a superpriority or subpriority amount, whether the sale should be  
12 equitably set aside, due process, and who are proper parties to the claim.

#### 13 *1. Statute of Limitations*

14 Parkside argues BONY’s claim is untimely because it is subject to either a 45- or 60-day  
15 limitation period under Nevada Revised Statutes § 107.080. Williston contends BONY’s claim  
16 is untimely because it is subject to a three-year limitation period as either a claim for liability  
17 created by statute or as equivalent to wrongful foreclosure. BONY contends its claim is not  
18 subject to any limitation period or alternatively is subject to a 5- or 10-year limitation period.

19 I have previously ruled that the four-year catchall limitation period in Nevada Revised  
20 Statutes § 11.220 applies to claims brought by a lienholder seeking to determine whether an  
21 HOA sale extinguished its deed of trust. *See Bank of Am., N.A. v. Country Garden Owners Ass’n*,  
22 No. 2:17-cv-01850-APG-CWH, 2018 WL 1336721, at \*2 (D. Nev. Mar. 14, 2018). In doing so,  
23 I rejected arguments similar to those Williston and BONY make for shorter or longer periods.

1 Parkside provides no authority for the proposition that the timelines in § 107.080 apply to a  
2 challenge to an HOA foreclosure sale under Chapter 116. That section refers to foreclosures of  
3 deeds of trust, not HOA liens. Nev. Rev. Stat. § 107.080(1). I therefore apply the four-year  
4 catchall limitation period to this claim.

5 The HOA sale was conducted on March 16, 2012, and the deed upon sale was recorded  
6 on February 1, 2013. ECF No. 50-9. BONY filed this lawsuit on February 23, 2016. ECF No. 1.  
7 Thus, even using the earlier date of the HOA sale, BONY's claim is timely. Accordingly, I deny  
8 Parkside and Williston's motions based on the statute of limitations as to this claim.

9 *2. Tender*

10 Under Nevada law, a "first deed of trust holder's unconditional tender of the  
11 superpriority amount due results in the buyer at foreclosure taking the property subject to the  
12 deed of trust." *Bank of Am., N.A. v. SFR Investments Pool 1, LLC*, 427 P.3d 113, 116 (Nev.  
13 2018) (en banc). To be valid, tender must be for "payment in full" and must either be  
14 "unconditional, or with conditions on which the tendering party has a right to insist." *Id.* at 118.  
15 "[A] promise to make a payment at a later date or once a certain condition has been satisfied  
16 cannot constitute a valid tender." *Bank of Am., N.A. v. Thomas Jessup, LLC Series VII*, 435 P.3d  
17 1217, 1219 (Nev. 2019) (holding that an "offer to pay the yet-to-be-determined superpriority  
18 amount was not sufficient to constitute a valid tender"). But tender is excused if the payment  
19 would not have been accepted. *Id.* at 1220 (holding that tender was excused where testimony  
20 established the HOA's agent would have rejected tender).

21 Here, no genuine dispute remains that Bank of America's letter did not constitute tender  
22 because Bank of America offered to pay the superpriority amount in the future once that amount

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1 was determined, but it did not tender payment.<sup>1</sup> ECF No. 50-8. BONY argues that tender is  
2 nevertheless excused because NAS would not have accepted the payment if it had been made.  
3 BONY does not present deposition testimony, affidavits, admissions, or answers to  
4 interrogatories in which NAS or Parkside state whether they would (or would not) have accepted  
5 payment on this property if Bank of America had tendered payment.

6 Instead, BONY relies on a brief filed in an arbitration proceeding to which NAS was a  
7 party. *See* ECF Nos. 50-12; 50-13. That brief, which NAS joined in September 2012, made  
8 arguments about when a superpriority lien was triggered, what was included in the superpriority  
9 lien, and whether lienholders could pay off the superpriority amount. Viewing the facts in the  
10 light most favorable to Williston and Parkside on BONY's motion for summary judgment,  
11 questions of fact remain about whether NAS would have accepted tender. The brief was filed six  
12 months after the HOA foreclosure sale in this case. Thus, it may or may not reflect NAS's  
13 position generally or in particular with respect to this property during the time period leading up  
14 to the March 2012 sale. Additionally, neither the brief nor NAS's joinder specifically states that  
15 NAS would have automatically rejected a tender of nine months' worth of assessments for this  
16 property during the relevant timeframe.<sup>2</sup>

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18 <sup>1</sup> Williston argues BONY failed to present evidence that NAS received the letter. BONY  
19 presented evidence that the letter was mailed, and in its reply BONY presented evidence that  
20 NAS received it. ECF Nos. 50-8; 59-1.

21 <sup>2</sup> BONY presents additional evidence in its reply brief. That evidence should have been  
22 presented in BONY's initial motion if it wanted to establish entitlement to judgment on the basis  
23 of that evidence. But even if I considered it, it does not establish BONY's entitlement to  
judgment as a matter of law. The trial testimony of NAS corporate counsel Chris Yergensen in  
another case does not establish that NAS would not have accepted payment of nine months'  
worth of assessments at the time of this foreclosure sale. Rather, Yergensen testified that NAS  
stopped responding to requests for the payoff amount. ECF No. 59-3. No one asked, and  
Yergensen did not say, whether in early 2012 NAS would have accepted payment of nine  
months' worth of assessments. *Id.*; *see also* ECF No. 59-2. He testified that sometimes the  
lenders would calculate the amount of nine months' worth of assessments and send a check in

1           However, viewing the facts in the light most favorable to BONY, a genuine dispute  
2 remains as to whether tender would have been futile. A reasonable jury could conclude that  
3 NAS would not have accepted payment of nine months' worth of assessments and instead would  
4 have accepted payment of only the total amount of the HOA's lien based on NAS's position six  
5 months later that the superpriority lien includes costs of collecting. I therefore deny all parties'  
6 motions on the tender issue.

7                     *3. Superpriority or Subpriority Sale*

8           BONY argues that NAS foreclosed on only the subpriority portion of the HOA's lien, as  
9 evidenced by NAS's belief that the superpriority lien was not triggered until the lender  
10 foreclosed on the deed of trust and by how NAS distributed the sale proceeds. Williston  
11 responds that NAS's after-the-fact beliefs or actions cannot alter the legal effect of the sale,  
12 which indisputably contained non-waivable superpriority amounts.

13           Even if an HOA can choose to foreclose on only the subpriority portion of its lien when  
14 the superpriority lien remains unsatisfied, BONY has not presented evidence raising a genuine  
15 dispute that the HOA was foreclosing on only a subpriority lien in this case. BONY has not  
16 pointed to evidence that the superpriority amount was excluded from the HOA lien amounts set  
17 forth in the foreclosure notices. *Cf. Saticoy Bay LLC, Series 346 S Milan St. v. MetLife Home*  
18 *Loans, LLC*, No. 74386, 437 P.3d 168, 2019 WL 1244785, at \*1 (Nev. 2019) (holding no  
19 genuine dispute that there was no superpriority lien where the "record contains undisputed  
20 evidence that the lien asserted in the notice of delinquent assessments was for interest, late  
21 charges, management company fees, collection fees, and collection costs and that the former  
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that amount. ECF No. 59-3 at 57-58, 74-75. But he did not state whether NAS would cash those checks.

1 homeowner owed no past-due HOA assessments at that time”). Rather, BONY concedes the  
2 former homeowners did not pay assessments and that the HOA lien was comprised of unpaid  
3 assessments, “with the necessary implication being that the HOA’s lien included a superpriority  
4 component.” *PennyMac Corp. v. SFR Investments Pool 1, LLC*, No. 73405, 425 P.3d 719, 2018  
5 WL 4413612, at \*3 (Nev. 2018); ECF Nos. 50 at 3; 50-5.

6 Nor is there any evidence that it was announced at the sale that only the subpriority lien  
7 was being foreclosed. NAS’s subjective beliefs about the legal effect of the sale or its post-sale  
8 distribution of proceeds are irrelevant to the sale’s actual legal effect. *See Wells Fargo Bank,*  
9 *N.A. on behalf of Holders of HarborView Mortg. Loan Tr. Mortg. Loan Pass-Through*  
10 *Certificates, Series 2006-12 v. Radecki*, 426 P.3d 593, 596-97 (Nev. 2018) (en banc). I therefore  
11 deny BONY’s motion for summary judgment on this basis.

#### 12 4. Equitably Set Aside the Sale

13 BONY argues the sale should be set aside on equitable grounds because Williston paid a  
14 grossly inadequate price and the sale was unfair where (1) Bank of America tried to pay the  
15 superpriority amount but NAS would not state what that amount was and (2) NAS told Bank of  
16 America that its deed of trust was secure. Williston responds that BONY has not shown an  
17 inadequate price because the price Williston paid was the fair market value fetched at a non-  
18 collusive foreclosure sale. Williston also argues that BONY has not shown that any unfairness  
19 brought about the allegedly low price.

20 BONY bears the burden of showing “that the sale should be set aside in light of  
21 [Williston’s] status as the record title holder . . . and the statutory presumptions that the HOA’s  
22 foreclosure sale complied with NRS Chapter 116’s provisions.” *Nationstar Mortg., LLC v.*  
23 *Saticoy Bay LLC Series 2227 Shadow Canyon*, 405 P.3d 641, 642-43 (Nev. 2017). “[M]ere

1 inadequacy of price is not in itself sufficient to set aside the foreclosure sale, but it should be  
2 considered together with any alleged irregularities in the sales process to determine whether the  
3 sale was affected by fraud, unfairness, or oppression.” *Id.* at 648. “A grossly inadequate price  
4 may require only slight evidence of fraud, unfairness, or oppression to set aside a foreclosure  
5 sale.” *SFR Investments Pool 1, LLC v. First Horizon Home Loans, a Div. of First Tennessee*  
6 *Bank, N.A.*, 409 P.3d 891, 895 (Nev. 2018) (en banc). However, the fraud, unfairness, or  
7 oppression must have “affected the sales price.” *Res. Grp., LLC as Tr. of E. Sunset Rd. Tr. v.*  
8 *Nevada Ass’n Servs., Inc.*, 437 P.3d 154, 161 (Nev. 2019) (en banc).

9 BONY has not presented evidence raising a genuine dispute that any fraud, unfairness, or  
10 oppression affected the sale price. BONY has not explained how Bank of America’s attempted  
11 tender or NAS’s allegedly misleading conduct affected the price at the foreclosure sale. BONY  
12 has not, for example, presented evidence that Bank of America did not attend the sale or bid on  
13 the property in reliance of either the tender attempt or NAS’s representations. And BONY has  
14 not presented evidence that any other bidder was deterred from bidding or bid less on these  
15 bases. I therefore deny BONY’s motion and grant Parkside and Williston’s motions that the sale  
16 will not be set aside on equitable grounds.

#### 17 5. Due Process

18 BONY argues Chapter 116 as it existed at the time of this sale violated its due process  
19 rights because it did not require the HOA to inform Bank of America the amount of the  
20 superpriority lien, that the deed of trust was at risk, or how to protect the deed of trust.  
21 Alternatively, BONY argues its due process rights were violated as applied because when Bank  
22 of America asked for the superpriority amount, NAS did not respond. BONY contends it “did  
23 everything it possibly could” and so the sale violates due process because BONY could not



1 identify the superpriority amount and pay it in advance. ECF No. 50 at 2. BONY also argues  
2 requiring the lender to pay the full lien amount and then seek a refund requires it to do more than  
3 is necessary to preserve its lien and is unconstitutional because there is no clear and certain  
4 remedy for a refund. Parkside and Williston argue that the Supreme Court of Nevada has  
5 previously rejected BONY's due process arguments. Williston also contends that BONY  
6 received actual notice through the HOA's foreclosure notices and those notices complied with  
7 due process.

8       To the extent BONY's due process claim is based on the reasoning of *Bourne Valley*  
9 *Court Trust v. Wells Fargo Bank, NA*, 832 F.3d 1154 (9th Cir. 2016) or the content of the  
10 notices, I grant Williston and Parkside's motions and deny BONY's motion. *See Bank of Am.,*  
11 *N.A. v. Arlington W. Twilight Homeowners Ass'n*, 920 F.3d 620, 623-24 (9th Cir. 2019) (citing  
12 *SFR Invs. Pool I, LLC v. Bank of N.Y. Mellon*, 422 P.3d 1248 (Nev. 2018) (en banc)); *Nationstar*  
13 *Mortg. LLC v. Amber Hills II Homeowners Ass'n*, No. 2:15-cv-01433-APG-CWH, 2016 WL  
14 1298108, at \*6-9 (D. Nev. Mar. 31, 2016).

15       As for BONY's as-applied challenge, it is not actually a challenge to the statute. The  
16 statute says nothing about whether an HOA or its agent must respond to a request for the  
17 superpriority amount. In any event, BONY fails to raise a genuine dispute for an as-applied due  
18 process violation. To prevail on a procedural due process claim, BONY must allege and prove  
19 "(1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of  
20 adequate procedural protections." *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149  
21 F.3d 971, 982 (9th Cir. 1998). "The fundamental requirements of procedural Due Process are  
22 notice and an opportunity to be heard . . . ." *Conner v. City of Santa Ana*, 897 F.2d 1487, 1492  
23 (9th Cir. 1990) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

1 BONY or its predecessor or agent received the foreclosure notices. ECF No. 54 at 18-19.  
2 BONY thus had notice that its deed of trust was in jeopardy, and it had an opportunity to take  
3 action to protect its deed of trust. BONY notes that it tried to do so through contacting NAS for  
4 the superpriority amount and NAS did not respond. But that is only one avenue by which BONY  
5 could have protected its interest. BONY could have sued to determine the superpriority amount  
6 or attended the HOA sale and bid on the property. Alternatively, BONY could have paid the  
7 entire lien amount and sued for a refund. BONY contends suing for a refund was not an  
8 available option because the statute provided no clear and certain remedy for a refund. I have  
9 previously rejected a similar argument based on the alleged lack of a clear and certain refund  
10 remedy. *Amber Hills II Homeowners Ass'n*, 2016 WL 1298108, at \*8-9.

11 Because BONY had notice and an opportunity to protect its interest, no genuine dispute  
12 remains. *See Bank of New York Mellon Tr. Co., N.A. v. Legends Maint. Corp.*, No. 2:16-cv-  
13 02567-MMD-GWF, 2019 WL 2176913, at \*4 (D. Nev. May 17, 2019) (rejecting similar as-  
14 applied arguments); *Carrington Mortg. Servs., LLC v. Tapestry at Town Ctr. Homeowners Ass'n*,  
15 No. 2:17-cv-01047-RFB-PAL, 2019 WL 1441612, at \*5 (D. Nev. Mar. 31, 2019) (same). I  
16 therefore deny BONY's motion and grant Parkside and Williston's motions on the as-applied  
17 due process allegations.

#### 18 6. Proper Party

19 Parkside argues that it is not a proper party to BONY's declaratory relief claim because it  
20 does not claim an interest in the property. Parkside would be a proper party if there was a basis  
21 to set aside the sale because its superpriority lien potentially would be reinstated. *See Nationstar*  
22 *Mortg., LLC v. Sundance Homeowners Ass'n, Inc.*, No. 2:15-cv-01310-APG-GWF, 2016 WL  
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1 1259391, at \*3 (D. Nev. Mar. 30, 2016). However, as there is no remaining basis to set aside the  
2 sale,<sup>3</sup> I grant Parkside's motion to dismiss it from the declaratory relief claim.

3 **B. Section 116.1113**

4 Count two of BONY's complaint alleges that Parkside and NAS breached a duty of good  
5 faith under § 116.1113 to notify lenders that the deed of trust was at risk, to identify the  
6 superpriority amount, and to provide the lenders an opportunity to protect the deed of trust. ECF  
7 No. 1 at 11. Parkside moves to dismiss and for summary judgment, arguing that this claim is  
8 untimely because it is subject to either a 45- or 60-day limitation period under § 107.080.

9 Alternatively, Parkside contends that BONY has not identified what contract or duty governed  
10 by Chapter 116 that Parkside breached. Parkside also argues that to the extent this claim is based  
11 on the content of the foreclosure notices, the Supreme Court of Nevada has ruled that the notices  
12 did not need to identify the superpriority amount. BONY responds<sup>4</sup> that Parkside sold the  
13 property for a grossly inadequate price and that Parkside (through NAS) wrongfully rejected  
14 tender, so it would be unfair for Parkside to sell the property free and clear of the deed of trust.

15 Assuming without deciding that this claim is timely, I grant Parkside's motions because  
16 BONY has not identified what statutory or contractual duty Parkside breached. The Supreme  
17 Court of Nevada has rejected the proposition that HOAs had to identify the superpriority amount  
18 in the foreclosure notices under the statutory scheme as it existed at the time of this sale. *See SFR*  
19 *Investments Pool 1 v. U.S. Bank*, 334 P.3d 408, 418 (Nev. 2014) (en banc). To the extent BONY  
20 contends Parkside had a duty to identify the superpriority amount when Bank of America

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22 <sup>3</sup> If BONY prevails on its tender allegations, the consequence will be that Williston took the  
23 property subject to the deed of trust. *See Bank of Am., N.A.*, 427 P.3d at 121. The sale thus will  
not be set aside even if BONY wins on tender.

<sup>4</sup> BONY did not move for summary judgment on this claim.

1 requested it, BONY does not point to any contractual or statutory provision that created a duty to  
2 do so. Finally, the Supreme Court of Nevada has rejected the notion that an HOA has a duty to  
3 obtain the highest price it could when conducting an HOA foreclosure sale. *Nationstar Mortg.,*  
4 *LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 405 P.3d 641, 644-45 (Nev. 2017). Thus,  
5 BONY's contention that the HOA sold the property for a grossly inadequate price does not  
6 amount to a breach of good faith under Chapter 116.

### 7 **C. Wrongful Foreclosure**

8 Count three of BONY's complaint alleges that the foreclosure was wrongful to the extent  
9 it extinguished the deed of trust because Parkside failed to give adequate notice and opportunity  
10 to cure the superpriority lien, Parkside sold the property for a grossly inadequate amount, and  
11 Parkside violated its duty of good faith under § 116.1113. ECF No. 1 at 12. Parkside moves to  
12 dismiss and for summary judgment, arguing that this claim is untimely because it is subject to  
13 either a 45- or 60-day limitation period under § 107.080. Parkside contends that if the claim is  
14 timely, BONY lacks standing to assert it because BONY is not a mortgagor. Alternatively,  
15 Parkside contends BONY fails to establish there was no default because there is no dispute that  
16 the homeowner was in arrears on the HOA assessments. Finally, Parkside argues BONY has not  
17 identified what was wrongful about the foreclosure because Parkside complied with the HOA  
18 foreclosure statutes in conducting the sale, the notices did not have to identify the superpriority  
19 amount, and Parkside has never contended that its sale extinguished the deed of trust.

20 BONY responds<sup>5</sup> that either the limitation period has not begun to run or that this claim is  
21 subject to a six-year limitation period because it arises from the HOA's Covenants, Conditions,  
22 and Restrictions, which is an instrument in writing. Alternatively, BONY contends the limitation  
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<sup>5</sup> BONY did not move for summary judgment on this claim.

1 period should be equitably tolled because NAS had previously taken the position that the  
2 superpriority lien did not exist until the lender foreclosed on the deed of trust and because NAS  
3 did not respond to the request for the payoff amount. Finally, BONY argues that if Parkside  
4 foreclosed on the superpriority lien even after BONY's tender cured the default, then the  
5 foreclosure was wrongful. BONY contends it has standing and that it can show through the  
6 tender attempt that the superpriority lien was not in default.<sup>6</sup>

7         Assuming without deciding that this claim is timely, I grant Parkside's motions. As  
8 discussed elsewhere, there is no due process violation, the notices did not have to contain the  
9 superpriority amount, and Parkside did not have to obtain a certain price at the foreclosure sale.  
10 As for tender, BONY does not explain how it will recover damages against Parkside. If BONY  
11 prevails at trial on tender, then BONY's deed of trust will not be extinguished, so foreclosure of  
12 the HOA lien will not be wrongful as to BONY. If BONY does not prevail on tender, then  
13 BONY does not explain how the foreclosure would be wrongful as to it. Rather, the foreclosure  
14 would extinguish the deed of trust because BONY did not properly tender. To the extent BONY  
15 is relying on the fact that NAS did not respond to the request for the superpriority amount, as  
16 discussed above BONY has not identified any statutory or contractual duty that required NAS to  
17 respond. Nor has BONY cited any law that NAS's failure to respond would subject Parkside to  
18 damages for wrongful foreclosure.

#### 19         **D. Deceptive Trade Practices**

20         Count five of BONY's complaint asserts that Parkside and NAS engaged in deceptive  
21 trade practices by (1) falsely representing the amount of the superpriority lien in the foreclosure  
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23 <sup>6</sup> BONY also argues that after the sale, Parkside incorrectly distributed the proceeds. Those  
allegations are not in the complaint and BONY cites no authority for the proposition that errors  
in post-sale distribution constitute wrongful foreclosure.

1 notices, (2) “falsely asserted the information contained in the recitals in the foreclosure deed,”  
2 and (3) falsely represented that the superpriority lien was not paid in advance of the sale. ECF  
3 No. 1 at 14. BONY also alleges that recording the foreclosure notices and refusing to accept  
4 tender violated Nevada Revised Statutes §§ 598.0915(15), 598.092(8), and 598.0923(2)-(3). *Id.*

5 Parkside moves to dismiss and for summary judgment, arguing that this claim is untimely  
6 because it is subject to either a 45- or 60-day limitation period under § 107.080. Parkside also  
7 contends that BONY is not a consumer within the meaning of the Nevada Deceptive Trade  
8 Practices Act (NDTPA), as it is a sophisticated lending institution and it has not consumed or  
9 purchased any goods or services from Parkside. It also contends that real estate transactions such  
10 as non-judicial foreclosure sales do not constitute consumer goods or services and BONY is not  
11 a party to a transaction with Parkside.

12 BONY responds<sup>7</sup> that its claim is based on the sale of goods and services to the original  
13 borrower or lender because the HOA provides services to homeowners and lenders by enforcing  
14 the Covenants, Conditions, and Restrictions (CC&Rs) and maintaining the neighborhood, in  
15 exchange for which the homeowners pay HOA assessments and lenders make loans to  
16 homebuyers in the community. BONY contends that in providing these services to the lenders,  
17 Parkside falsely misrepresented what the superpriority lien was and obstructed tender of the  
18 superpriority amount.

19 *1. Timeliness*

20 Parkside provides no authority for the proposition that an NDTPA claim is governed by  
21 the time limits in § 107.080. That section refers to foreclosures of deeds of trust, not HOA liens,  
22 nor does it reference the NDTPA. Nev. Rev. Stat. § 107.080(1). A deceptive trade practices  
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<sup>7</sup> BONY did not move for summary judgment on this claim.

1 claim is governed by a four-year limitation period. Nev. Rev. Stat. § 11.190(2)(d). Parkside  
2 made no arguments about whether BONY's claim is untimely under the proper limitation period.  
3 I therefore deny Parkside's motions on statute of limitations grounds.

## 4                   2. *Consumer Fraud*

5           Nevada Revised Statutes § 41.600 creates a cause of action for a victim of "consumer  
6 fraud," which includes deceptive trade practices identified in § 598.0915 to § 598.0925.  
7 BONY's complaint relies on two statutory sections that apply to deceptive practices related to  
8 the sale or lease of goods or services. Nev. Rev. Stat. § 598.0923(2) (making it a deceptive  
9 practice to "knowingly . . . [f]ail[ ] to disclose a material fact in connection with the sale or lease  
10 of goods or services"); *id.* § 598.0923(3) (making it a deceptive practice to "knowingly . . .  
11 "[v]iolate[ ] a state or federal statute or regulation relating to the sale or lease of goods or  
12 services"). Because an HOA foreclosure sale is the sale of real estate, not goods or services,  
13 these sections have no application in this context. *See Bank of New York Mellon v. Log Cabin*  
14 *Manor Homeowners Ass'n*, 362 F. Supp. 3d 930, 939 (D. Nev. 2019); *The Bank of New York*  
15 *Mellon fka The Bank of New York v. Cape Jasmine CT Tr.*, No. 2:16-CV-0248-JAD-GWF, 2016  
16 WL 3511253, at \*4-5 (D. Nev. June 27, 2016). I therefore dismiss these allegations with  
17 prejudice.

18           However, other sections of Chapter 598 are not necessarily limited to transactions  
19 relating to the sale or lease of goods or services. *See Abernathy v. Cont'l Serv. Grp., Inc.*, No.  
20 2:17-cv-00636-APG-NJK, 2018 WL 3370524, at \*5 (D. Nev. July 9, 2018) (citing *Cape Jasmine*  
21 *CT Tr.*, 2016 WL 3511253, at \*4-5). As relevant here, § 598.092(8) makes it a deceptive trade  
22 practice to "[k]nowingly misrepresent[ ] the legal rights, obligations or remedies of a party to a  
23 transaction." And § 598.0915(15) makes it a deceptive trade practice to "[k]nowingly make[ ]

1 any other false representation in a transaction.” Because these two sections refer to a  
2 “transaction,” rather than the sale or lease of goods or services, Parkside has not established that  
3 these sections could not apply to a real estate transaction like an HOA foreclosure sale.

4 Parkside contends, however, that BONY is not a “consumer” who can assert a claim  
5 under § 41.600 because it is a sophisticated lender and it is not a party to a transaction with  
6 Parkside. BONY does not specifically respond to these arguments, instead arguing its general  
7 theory that the HOA provides services to homeowners and lenders by enforcing the CC&Rs and  
8 in exchange the homeowners pay HOA assessments.

9 Section 41.600’s plain language does not limit consumer fraud claims to unsophisticated  
10 plaintiffs or to a party to the transaction in which the deceptive trade practice occurs. Rather,  
11 § 41.600 permits “any person who is a victim of consumer fraud” to bring suit. Additionally, it  
12 defines consumer fraud by reference to deceptive practices set forth in other statutory sections. It  
13 is not apparent that each of those statutory sections requires the plaintiff to have been a party to  
14 the transaction in which the false representation was made to be a victim of the fraud. I therefore  
15 deny Parkside’s motions because Parkside has not shown it is entitled to either dismissal or  
16 summary judgment on the basis of the arguments it has made.<sup>8</sup>

### 17 **III. CONCLUSION**

18 IT IS THEREFORE ORDERED that defendant Parkside Village Homeowners’  
19 Association’s motions to dismiss and for summary judgment (**ECF Nos. 44, 52**) are **GRANTED**  
20 **in part**. The motions are granted as to plaintiff Bank of New York Mellon’s claims for

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22 <sup>8</sup> I do not consider the argument Parkside makes for the first time in its reply that securing or  
23 collecting debts does not constitute doing business in Nevada within the NDTPA’s meaning. *See*  
ECF No. 60 at 8; *Vazquez v. Rackauckas*, 734 F.3d 1025, 1054 (9th Cir. 2013) (“[W]e do not  
consider issues raised for the first time in reply briefs.”).



1 declaratory relief, breach of § 116.1113, wrongful foreclosure, and deceptive trade practices  
2 based on §§ 598.0923(2)-(3). The motions are denied as to the remainder of the deceptive trade  
3 practices claim.

4 IT IS FURTHER ORDERED that plaintiff Bank of New York Mellon's motion for  
5 summary judgment (**ECF No. 51**) is **DENIED**.

6 IT IS FURTHER ORDERED that defendant Williston Investment Group LLC's motion  
7 for summary judgment (**ECF No. 48**) is **GRANTED in part**. The motion is granted as to the  
8 issues of equitably setting aside the sale and due process. The motion is denied as to the issues  
9 of timeliness and tender.

10 DATED this 10th day of June, 2019.



11  
12 ANDREW P. GORDON  
13 UNITED STATES DISTRICT JUDGE  
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